No. 16290

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMOS BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

This is an appeal from an Order of the United States District Court for the Southern District of California denying the motion of appellant to vacate a prior sentence and judgment in case No. 26039-CD. On September 16, 1957, appellant was sentenced to two consecutive terms totaling thirty years for violations of Section 174, Title 21, United States Code.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

Statement of the Case.

A complaint was filed against Amos Black on March 10, 1957, before United States Commissioner Theodore Hocke for violation of Title 21, United States Code, Section 174 [R. 6, Vol. I].* A warrant for Black's arrest issued by the Commissioner pursuant to the complaint was returned unexecuted as the petitioner was then in the custody of other authorities [R. 8 and 10, Vol. I]. Black and his co-defendant, Yvonne Shelton, were then indicted by the Federal Grand Jury on July 3, 1957, bond was fixed at $20,000 for each defendant, and bench warrants were issued for the arrest of each defendant [R. 2-4, 13, Vol. I]. It is apparent that Black was still in the custody of the Los Angeles County Sheriff because on July 10, 1957, a Writ of Habeas Corpus was issued by the Honorable Peirson M. Hall, directing the Sheriff to produce Amos Black in the United States District Court for arraignment and plea [R. 10, 26, Vol. I]. The Writ was executed and Black was brought into the United States District Court, Southern District of California, Central Division on July 15, 1957, at which time and place he was arraigned and pleaded not guilty to all three counts of the indictment [R. 12, Vol. I; R. 4-5, Vol. II], and the matter was set for trial on August 13, 1957 [R. 6, Vol. II]. On July 30, 1957, Amos Black became a Federal prisoner when the bench warrant for his arrest, issued pursuant to the indictment, was executed by the United States Marshal [R. 13, Vol. I]. On August 9, 1957, Black's Motion to Produce Documents was denied by the Court after a careful consideration of the import of the then recent *Jencks* decision [R. 14-21, 31, Vol. I; R. 22-27, Vol. II]. On August 13, 1957, upon Motion of Welford Wilson, Black's

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*The letter "R" refers to the Record on Appeal.

counsel, Dr. Victor Parkin was appointed by Judge Hall to conduct a psychiatric examination of the petitioner to determine if he was able to understand the proceedings against him and properly assist in his own defense [R. 32-33, 40, Vol. I; R. 31, Vol. II]. On August 15, 1957, the Court heard the testimony of Dr. Parkin and found the defendant Black competent to stand trial and properly assist in his own defense [R. 51-56, Vol. II]. On the preceding day, August 14, 1957, co-defendant Shelton pleaded guilty to a two count superseding information charging her with distribution of narcotics [R. 38-42, Vol. II]. She was sentenced to twenty years imprisonment on her plea of guilty on September 16, 1957 [R. 273, Vol. II].

The trial of Amos Black commenced on August 22, 1957, after a jury had been impanelled on August 20, 1957 [R. 67 and 72, Vol. II]. The trial continued on August 23, was resumed for further jury trial on August 27 on which date the jury found defendant Black guilty on all three counts of the indictment [R. 51-55, Vol. I; R. 72-264, Vol. II]. On September 16, 1957, Black was sentenced to fifteen years imprisonment on each count, the first two counts to be served concurrently and the sentence on Count Three to be served consecutively to Counts One and Two [R. 6, 62, Vol. I; R. 266-269, Vol. II].

It was shortly after sentence that Amos Black began writing numerous letters to various judges in the District Court and the Court of Appeals. In response to one of these letters [R. 64-65, Vol. I], the Court appointed James L. Garcia to represent Black [R. 71, Vol. I]. This Court denied Black leave to appeal *in forma pauperis* on November 12, 1957 [Undocketed, Misc. 696, see also R. 288, lines 14-19, Vol. II] and no appeal was ever taken

from the judgment of the Court below. The letters and motions continued to arrive, however, and their sheer volume [R. 72-73, 76-77, 78-81, Vol. I] and the statements made by the defendant in Court on May 5, 1958, prompted the Court below to order a hearing for Mr. Black under Title 28, United States Code, Section 2255, on June 9, 1958. The letters continued to arrive from Black [R. 86-87, 88-89, Vol. I]. The hearing under Section 2255 was continued to June 30, 1958, and the Government was ordered to furnish a copy of the trial transcript to Black [R. 90, Vol. I]. An Opposition to the petitioner's Motions was filed by the Government on June 25, 1958 [R. 91-97, Vol. I], and on June 30, July 2, July 8 and July 9, the petitioner argued his cause and the matter was submitted [R. 100-101, 117-118, Vol. I]. Interspersed between these hearings and continuing after their conclusion, a barrage of Motions, letters, and miscellaneous papers from the petitioner were filed in the Court below [R. 104-116, 119-131, 132-133, 134, 135-136, 138-139, 140-141, 143-144, 145-146, 147, Vol. I]. All these papers appeared to be further statements in support of the motion under Title 28, United States Code, Section 2255. Or perhaps they were all successive Section 2255 motions. It is difficult to tell. On September 23, 1958, Judge Hall denied Black's motion in a memorandum opinion [R. 148-153, Vol. I].

Piqued to new activity by the adverse decision of the Court below, Black filed a Notice of Appeal, an Opposition to Memorandum and Order, a Writ of Habeas Corpus, a Motion to be Released on his Own Recognizance, and a Motion to Produce Documents [R. 154-157, 172-174, Vol. I]. The latter two motions were denied by Judge Hall on December 4, 1958 [R. 183-184, Vol. I]. On the same date, Judge Hall ordered that the entire file be certified as the record on appeal [R. 194, Vol. I].

To this date the petitioner has elected not to commence service of his sentence and remains in the County Jail [R. 63, 64, Vol. I; see also Appendix to Appellee's Brief].

I.

There Was No Denial or Infringement on the Petitioner's Constitutional Rights so as to Render the Judgment Vulnerable to Collateral Attack.

A. Petitioner, as accurately as his brief can be interpreted, complains that he was denied his constitutional rights in that he was not arrested pursuant to a commissioner's warrant and immediately taken before a commissioner (App. Br. 3-5).* The contention is without merit since the warrant was returned unexecuted because Black was then in State custody [R. 8, Vol. I]. In view of the fact there was no arrest, the provisions of Rule 5(a), Federal Rules of Criminal Procedure, Title 18, requiring the arresting officer to take the prisoner before a commissioner "without unnecessary delay," do not apply. If there were some irregularity in the arrest here, which there was not, questions regarding the propriety of arrests cannot be raised under the provisions of Title 28, United States Code, Section 2255, but rather must be raised by appeal.

Brule v. United States, 240 F. 2d 589 (9th Cir., 1957);

Lewis v. United States, 235 F. 2d 580, 581 (9th Cir., 1956).

See also:

Yodock v. United States, 97 Fed. Supp. 307, 310 (D. C. Pa., 1951).

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*This refers to appellant's brief.

B. Petitioner next complains that no bail was fixed in his case. This is, of course, not true. A bail of $20,000 was set on the indictment on July 3, 1957, and a bench warrant issued thereon [R. 2-4, 13, Vol. I]. Appellant was then in State custody and was produced in court pursuant to a Writ of Habeas Corpus *ad Prosequendum* for arraignment and plea on July 15, 1957 [R. 10-11, Vol. I; R. 4-5, Vol. II]. The bench warrant was executed on July 30, 1957, at which time Black became a Federal prisoner.

C. There was no conspiracy to deprive Black of his rights, as he alleges on page 13 of his brief merely because different charges were filed against his co-defendant, Yvonne Shelton. She pleaded guilty to both counts of a superseding information and was sentenced to twenty years imprisonment [R. 38-42 273, Vol. II]. Nor was there any "deal" to deprive him of such rights. Co-defendant Shelton was not called as a government witness, nor did she testify at all at the trial of Amos Black.

D. Petitioner's allegation and attempts to show by extracts from the transcript that Agent Gilkey testified falsely are so confused and unintelligible as to almost preclude an answer. Perhaps Black's unfamiliarity with the law and all its subleties has lead him to make allegations which a lawyer would not make. Perhaps one illustration will suffice to show his honest confusion undoubtedly provoked by the mysteries and intricacies of the law. On pages 19 and 20 of his brief he tries to show that Agent Gilkey contradicted himself when answering questions regarding the meaning of the term "old man."

> "Q. What did he mean by my old man Billy?
> A. I don't know what he meant." [R. 133, Vol. II.]

Petitioner points to the following colloquy on the following day to show alleged inconsistencies:

"By Mr. Wilson:

Q. Now, do you know in the language of the streets what the term 'old man' means? A. Yes I think so.

Q. Yesterday you didn't. A. That isn't correct, sir."

It is obvious that there is no inconsistency between the above extracts. On the first occasion, petitioner's counsel asked the agent what someone else meant by "old man." On the second occasion he asked Mr. Gilkey if he knew the meaning of the term.

The other alleged inconsistencies seem to be immaterial (App. Br. 21-25). On the occasion of the extended inquiries into the character of Eddie Houston, the witness appeared to be somewhat confused by the questions, but resolved all confusions satisfactorily when he stated that he thought Houston was possibly a homosexual [R. 142, Vol. II]. The materiality of the entire line of questioning is also somewhat doubtful.

In any event the only real question Black raises is one of credibility. Such an inquiry is not open in a Section 2255 proceeding (see II, *infra*).

E. Similarly the character of Eddie Houston is not at issue here, especially since he did not answer any questions at the trial, but instead declined to answer on the basis of the Fifth Amendment [R. 213-215, Vol. II].

F. Petitioner's insistence upon production of Grand Jury minutes is similarly without merit. There was no transcript taken of the testimony in the Grand Jury relating to this case. Reports of the officers involved in this

case, however, were given to defense counsel after such officers had testified on direct examination [R. 153-154, Vol. II]. This is all the *Jencks* decision required.

See:

Jencks v. United States, 353 U. S. 657 (1956).

See also: Title 18, United States Code, Section 3500, which clarifies the *Jencks* decision.

Even if there had been a transcript of testimony before the Grand Jury, petitioner would not have been entitled to it under the *Jencks* ruling.

Angelet v. United States, 255 F. 2d 383 (2d Cir., 1958).

See also:

Federal Rules of Criminal Procedure, Rule 6(e).

Petitioner's citation of Title 18, United States Code, Section 3432, relating to production of lists of jurors and witnesses had no application to this case since that section only applies to capital offenses.

G. Defendant Black was Afforded that Degree of Representation by Counsel Guaranteed Him by the Sixth Amendment.

A reading of the Reporter's Transcript of this case reveals that Mr. Welford R. Wilson, counsel for Amos Black, conducted a competent and vigorous defense. The complaint Mr. Black makes against Mr. Wilson has been considered many times by appellate courts, because convicts often blame their attorneys for their incarceration. In this regard, Judge Denman's observations in *Latimer v. Cranor,* 214 F. 2d 926, 929 (9th Cir., 1954) are applicable to the instant case:

"The application alleges that Latimer's attorney mishandled his case.

"This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney's conduct was so incompetent that it made the case a farce requiring the Court to intervene in his client's behalf. We find no denial of the efficient representation of the Constitution."

See also:

Hall v. United States, 235 F. 2d 838 (D. C. Cir., 1956).

II.

Petitioner May Not Use Proceedings Under Title 28, United States Code, Section 2255, to Raise Issues Which Were Raised or Should Have Been Raised at the Trial, or Which Should Be Raised by Appeal.

Banghart v. United States, 208 F. 2d 902 (4th Cir., 1953);

Taylor v. United States, 177 F. 2d 194 (4th Cir., 1949);

Ford v. United States, 234 F. 2d 835 (6th Cir., 1956).

A. Thus petitioner's questioning the credibility of Agent Gilkey's testimony is not proper under Section 2255. Such inquiries are for the consideration of the jury.

B. Similarly the issue of entrapment was raised at the trial and argued quite competently by petitioner's counsel [R. 226-236, Vol. II] and the Court instructed the jury on this defense [R. 257-258, Vol. II]. Even if it had not been raised at the trial, it cannot be raised here under the provisions of Section 2255.

Stanley v. United States, 239 F. 2d 765 (9th Cir., 1956);

United States v. Lyons, 256 F. 2d 749 (2nd Cir., 1958).

III.

This Court Has No Jurisdiction to Hear This Petition Because the Petitioner Is Not "in Custody Under Sentence."

Section 2255 of Title 28, United States Code provides as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

In the instant case, petitioner Black has elected not to commence service of his sentence [see Appendix to this Brief, and R. 151, Vol. I], but instead has remained at the Los Angeles County Jail serving so-called "dead time." A prisoner in such status may not attack a sentence imposed by the trial court for the reason that he is not "in custody *under sentence*" of the court (emphasis added).

Crow v. United States, 186 F. 2d 704, 707 (9th Cir., 1950) (defendant at time of petition was serving another sentence prior to service of the sentence he was attacking);

Lopez v. United States, 186 F. 2d 704 (9th Cir., 1950) (petitioner had already completed sentence he was attacking);

United States v. Bradford, 194 F. 2d 197 (2d Cir., 1951) (to the same effect as *Lopez, supra*).

IV.

Conclusion.

For the above stated reasons the order of the Court below should be affirmed.

Respectfully submitted,

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ed States Marshal
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Angeles, California

reby do not elect to commence serving my sentence at an
itution designated by the Attorney General pending outcome of
ppeal.

d: Sept 30th 1957

Amos Black
(Signature of Defendant)

ete "do" or "do not", whichever is appropriate).